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NEC ELECTRONICS CORPORATION and
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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

Pursuant to Civil Local Rule 7-11, Defendants hereby move for administrative relief for leave to file a supplemental brief to correct certain misstatements by Plaintiffs at the September 3, 2009 hearing on class certification and to address new issues raised by the Court at the hearing that

1 were not briefed by the parties. The supplemental brief Defendants seek to file is attached as Exhibit
 2 A to the Declaration of Patrick M. Ryan in support of this Motion.

3 Defendants' counsel met and conferred with Plaintiffs' counsel regarding the filing of this
 4 brief. Initially, Plaintiffs' counsel indicated that they might stipulate to the filing of simultaneous
 5 supplemental briefs because a number of issues raised at the hearing had not been briefed, but on the
 6 day of the filing of this motion, Plaintiffs decided not to stipulate to the filing of supplemental briefs.
 7 (Declaration of Patrick M. Ryan in support of this Motion for Leave to File Supplemental Brief, ¶ 3–
 8 7.)

9 **I. GOOD CAUSE EXISTS TO ALLOW FOR THE FILING OF A
 10 SUPPLEMENTAL BRIEF**

11 To aid the Court in deciding the issues raised at the hearing on Plaintiffs' Motion for Class
 12 Certification, Defendants seek leave to file a supplemental brief to address certain materially
 13 inaccurate statements made by Plaintiffs at the hearing with respect to the nature of their claims and
 14 the injury requirements Plaintiffs must meet for certification of a nationwide injunctive class under
 15 Fed. R. Civ. P. 23(b)(2) as well as a damages and restitutionary class under Fed. R. Civ. P. 23(b)(3).

16 For example, at the class certification hearing, Plaintiffs created the impression that they did
 17 not plead a legal damages claim under California law and that they are only asking for equitable
 18 relief for which a bench trial is sought. This is contrary to Plaintiffs' own pleadings. Plaintiffs
 19 brought a claim for relief under the Cartwright Act for damages, which will be tried to a jury if this
 20 case is certified. (See Plaintiffs' Third Amended Complaint at ¶ 209.) Plaintiffs also represented at
 21 the hearing that an evidentiary showing of injury is not required to assert a claim for injunctive relief
 22 under California or federal law. This patently misstates the law in the Ninth Circuit. It is black-
 23 letter law that both claims require that each class representative make an evidentiary showing of
 24 actual individualized injury to establish standing and to establish that certification may be granted.
 25 Plaintiffs also misstated the injury requirement with respect to restitution under many states' unfair
 26 competition statutes, including a claim under Cal. Bus. & Prof. Code §§ 17200, *et seq.*

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The supplemental brief defendants seek leave to file also addresses new issues raised by the Court at the hearing that were not briefed by the parties, including whether the Court must consider injury to individual proposed class representatives for certification of a injunctive class or a restitutionary class and whether the Court should bifurcate the issue of conspiracy from injury.

Because the Court is entertaining Plaintiffs' arguments, including the inaccuracies stated at the hearing, in its consideration of class certification, good cause exists for Defendants to present the Court with the applicable authority on these pertinent issues. On this basis, Defendants seek permission from the Court to file the supplemental brief attached as Exhibit A to the Declaration of Patrick M. Ryan in support of this Motion.

II. CONCLUSION

Based on the foregoing, Defendants respectfully request that the Court grant Defendants' Administrative Motion for Leave to File a Supplemental Brief Regarding Inaccurate Statements and New Issues Raised at the Hearing on Class Certification and order the supplemental brief attached as Exhibit A to the Declaration of Patrick M. Ryan deemed filed *nunc pro tunc* as of the date of the filing of this Motion.

Dated: September 16, 2009

Respectfully submitted,

WINSTON & STRAWN LLP

By /s/ Sean D. Meenan
SEAN D. MEENAN
Attorneys for Defendants
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I, Sean D. Meenan, hereby attest, pursuant to N.D. Cal. General Order No. 45, that the concurrence to the filing of this document has been obtained from each signatory hereto.

/s/ Sean D. Meenan
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